

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
July 18, 2006 Session

STATE OF TENNESSEE v. FERNANDEZ DEON DAVENPORT

Appeal from the Circuit Court for Coffee County
No. 33,076F L. Craig Johnson, Judge

No. M2005-01729-CCA-R3-CD - Filed September 1, 2006

The defendant, Fernandez Deon Davenport, appeals from his conviction for second degree murder, a Class A felony. He received his conviction in a jury trial in the Coffee County Circuit Court, and he was sentenced to sixty years as a Range III offender. He claims in this appeal that the evidence is insufficient to support his conviction, that the trial court erred in denying a mistrial when a witness made a reference to the defendant having been “locked up,” and that the sentence was improper. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOSEPH M. TIPTON, J., delivered the opinion of the court, in which ALAN E. GLENN, J., joined. GARY R. WADE, P.J., not participating.

B. Campbell Smoot, District Public Defender, and Margaret C. Lamb, Assistant Public Defender, for the appellant, Fernandez Deon Davenport.

Paul G. Summers, Attorney General and Reporter; Elizabeth B. Marney, Senior Counsel; Charles Michael Layne, District Attorney General; and Felicia B. Walkup, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The defendant’s conviction is a result of the death of Tony Jermaine Hopkins outside Club Premier in Tullahoma. Hopkins died on July 14, 2003, after he received a nine millimeter gunshot wound to the face and head. At the trial, the state presented evidence to support its theory that the defendant, who was known as “Mafia,” shot the victim because they were romantic rivals for the affections of Jessica Myrick. The state’s evidence included eyewitness identification of the defendant as the shooter. The defendant focused on inconsistencies in the witnesses’ accounts and attempted to place suspicion upon individuals from Chattanooga who had been present at the time of the shooting.

The victim's mother, Rosemary Sales, testified that the victim was her only son and was twenty years old at the time of his death. She said that he was popular and had three girlfriends, including someone named Jessica who lived in Cowan.

Doctor Bruce Levy testified that he performed an autopsy of the victim. He determined that the cause of death was a distant entrance gunshot wound to the head which was fired from a distance of two feet or more. Doctor Levy testified that there was no way to know exactly how or from what angle the shot was fired. The doctor removed a bullet from the victim's head.

Special Agent Steve Scott testified that he worked in the firearms identification section of the Tennessee Bureau of Investigation. He examined a bullet recovered by the medical examiner and determined that it was a nine millimeter caliber bullet.

Investigator Johnny Gore of the Tullahoma Police Department testified that he was called at 2:36 a.m. on July 14, 2003, to respond to a shooting at Club Premier. When he arrived, other officers were already present on the scene. They informed him that several witnesses had said that Mafia was the shooter. Investigator Gore was informed that another person had been beaten because he was initially believed to be the shooter. Both the victim and the other person had been taken to a local hospital by the time Gore arrived. Gore found a blue Grand Prix and a gold Dodge Stratus in the parking lot. He also found shirts and bandanas on the ground, blood in three locations, and a nine millimeter shell casing. Gore testified that the area was lit by a street light and that he was able to see in the parking lot, although he used a flashlight when collecting evidence. Gore went to the hospital, but both individuals had been airlifted to Vanderbilt University Hospital.

Investigator Gore testified that on July 14, he received several anonymous telephone calls in which the caller said that Mafia had done the shooting and was at his girlfriend Jessica Myrick's apartment in Cowan. Gore and another officer went to Myrick's apartment about 7:00 or 8:00 p.m. on July 14. Gore questioned Myrick, who denied that the defendant was inside her home. However, as they continued to talk, Myrick sat down in a chair outside her apartment with her back to the apartment and whispered to Gore that the defendant was inside. Gore testified that he and the other officer apprehended the defendant but that they did not find a gun inside the apartment.

Investigator Gore testified that he was told that "Puerto Rico," who was from Chattanooga, might have shot the victim and that some individuals from Chattanooga in a white Lincoln had been at Club Premier. Gore said that he had not been able to obtain any information other than street names regarding the identity of the individuals from Chattanooga and that he had not spoken with the authorities in Chattanooga. Gore conceded that he had received information a couple of weeks after the crime from a patrolman from Cowan who had stopped five individuals from Chattanooga in a white Lincoln and that he had been provided their names. Gore's testimony was not clear, however, with respect to when this stop had taken place.

Mickey Cannon testified that he was a friend of the victim. At the time of the trial, he was serving a three-year sentence in the Department of Correction for evading arrest. Cannon testified

that the victim and Myrick had a relationship and that Myrick was in a relationship with the defendant at the same time. Cannon had a relationship with one of Myrick's friends, and he and the victim visited these women together. A week or two before the shooting, Cannon had been with the victim at Club Premier when the defendant told the victim he needed to "stop messing with" Jessica Myrick. The victim responded that he did not want Myrick. According to Cannon, the defendant reached down into his pants, but he did not pull out a weapon.

Cannon testified that on the night of the shooting, he went with the victim, Dominic Sales, John Cannon, and two of John's friends whose names Cannon did not know to Club Premier around midnight. They took a blue Grand Prix and a gold Dodge Stratus. When they went inside, they saw a group of individuals in red who were unfamiliar to them. The defendant, who was also wearing red, was in the same area of the club as this group. Cannon and his friends drank and danced, and the group in red stared at them. There was a fight between two girls, and the club closed early. The group in red went outside before Cannon and his group. Cannon and his group started walking toward their cars, but they noticed the defendant and his group staring at them. Cannon said he and his group began walking toward them. A group of people from Shelbyville, who Cannon and his friends knew, walked behind them toward the defendant and his group. The defendant and his group were standing near a white Lincoln and another car. Cannon testified that nothing was said as they approached the defendant and his group until the defendant said, "F— that s—" and brought his arm up and shot the victim, who grabbed his face and fell to the ground. He said that the defendant turned and ran and that he chased the defendant. Cannon testified that he saw the defendant get into a car which drove away. Cannon professed that he was not involved in the beating of O'Neal Wellington.

Dominic Sales testified that he was the victim's cousin and that he accompanied the victim and Mickey Cannon to Club Premier on the night the victim was shot. John Cannon met them at the club. Sales said that he smoked marijuana on the way to the club and that he and his companions drank beer inside the club. Sales said he did not see the defendant inside the club, although he might have seen him outside the club when they first arrived. He was aware of the other group inside the club, but he denied that he had seen any staring between the groups. After the fight inside the club, the other group left immediately, but Sales and his friends stayed inside for five to ten minutes. When Sales and his companions went outside, they walked toward the Lincoln where the defendant and the other group had congregated. Sales claimed he did not know why they did this and said he was just following his cousin, the victim. Sales testified that, at this point, the group he was with consisted of about seven people including himself, the victim, Mickey Cannon, John Cannon, and some other men from Shelbyville. The defendant's group consisted of about seven or eight people. Sales said that someone in his group said, "F— it. That ain't nothing but a bunch of kids – there ain't nothing but a bunch of kids over there." The defendant said, "F— that s—," pulled a gun, and shot the victim in the face. Sales testified that the defendant ran and that Mickey Cannon chased him. Sales claimed that he did not see anyone get beaten after his cousin was shot. He said he saw the police arrive on the scene but did not talk to them. He denied that there had been prior problems between his group and the defendant at another club on an earlier occasion, but he said he was aware that his cousin "had a relation with a girl."

Natasha Sims testified that she was a friend of the victim and that she knew the defendant through a mutual friend. Sims was at Club Premier on July 13 and into the morning of July 14. She saw the defendant inside the club sitting at a table with some friends. Sims said she was sitting on the hood of her car in the parking lot after the club closed. She saw the victim's group standing by their cars and the defendant's group standing by a white Lincoln. The two groups were yelling back and forth to each other and "got into it." The victim's group went over to the defendant's group. Sims testified she heard Mickey Cannon say, "Squad up." She heard the defendant say, "F— that s—," and saw him pull a gun from his waist and fire. Sims saw individuals in the victim's group run after individuals in the defendant's group, and she saw Dominic Sales and Shawn Cannon jumping up and down on someone's body. Sims acknowledged that she had previously said she was not sure who shot the victim, but she testified that she was positive that it was the defendant.

Gwendolyn Mosley testified that she had dated the victim off and on for two to three years but that they were not together at the time of his death, having broken up in April 2003. Mosley was a friend of the defendant's, and she wrote letters to him about the victim and Jessica Myrick. She asked him in a letter if he was aware of a rumor that his girlfriend was sleeping with her boyfriend. She testified that he acknowledged that he was aware of this, but she could not remember exactly what he had said because she had not kept their correspondence. Mosley testified that these letters were exchanged when the defendant "was locked up in 2002."

Tesha Baker testified that she sometimes dated O'Neal Wellington. Before July 14, she had borrowed a nine millimeter gun for protection. When Baker moved out of her apartment about a week before the victim's death, she and Wellington took the weapon to Jessica's house. Wellington stored it in Jessica's bedroom closet. The defendant was in the bedroom when Wellington put the gun in the closet. Baker testified that she saw the defendant and someone named Mario at Vanderbilt University Hospital on July 14 and that she, Jessica, and someone named Nicole gave the defendant and Mario a ride. She asked the defendant for the gun while they were in the car, but he said he did not have it. He also denied that he had shot the victim.

Baker also testified that she was at Club Premier on the night of the shooting. She was in the parking lot and heard a gunshot, but she "didn't see too much of anything." She saw someone getting beaten, but she did not realize it was Wellington. She recognized some people at the club that evening as individuals from Chattanooga whom she had seen at Jessica's apartment. She said that she knew someone called Puerto Rico and that he had been at the club that evening. Baker said she was unaware of any tension between groups inside the club that night.

The defense called Maranda Taylor to testify during its case-in-chief. Taylor testified that she was at Club Premier with friends on the night of the shooting. She saw several people from Chattanooga whom she had met at Jessica's house a couple of days earlier, including Puerto Rico. She was in the parking lot after the club closed, and she saw the victim and Mickey Cannon walk toward a group of about ten people in a huddle around a Lincoln, which included the defendant and the people from Chattanooga. Taylor testified that she heard, "Squad up," but her testimony was ambiguous regarding whether the victim or Cannon said it. Taylor testified that she and her friends

realized there was about to be trouble and got into their car. As Taylor shut the car door, she heard a gunshot. She got out of the car and saw the victim on the ground, and two members of his group picked him up and put him in the trunk of the Lincoln. Taylor saw Wellington, who was running, trip over a log, and several men jumped on him and started beating him. She identified two of the attackers as “Mickey and his brother.”

O’Neal Wellington testified that he knew the defendant and knew that the defendant dated someone named Jessica. He said that he was “just friends” with Tesha Baker and that he had been married for three years. Wellington testified that he remembered going to Club Premier in the summer of 2003 and remembered getting “jumped.” However, he could not remember what happened beyond that. He was seriously injured and was hospitalized for almost a year. He suffered a head injury which had affected his memory. He attempted to get a job, but he got lost going to work.

Jermaine Officer, who was in jail for a cocaine conviction, testified that he was at Club Premier on the night of the shooting. He saw the defendant and Wellington enter the club about midnight. He said no words were exchanged between his group and the other group in question, although he said there was some “looking at people.” After the club closed, he and his group went outside to Wellington’s car and the white Lincoln that the Chattanooga people had driven. The victim’s group came out of the club and started talking about “Squad up,” which Officer said meant they were about to fight. Officer said that he was standing next to the defendant and that he heard a gunshot. He claimed, however, that although he did not see who fired the shot, he was sure it did not come from next to him. Officer conceded that he had previously given a statement in which he said he did not know whether the defendant had fired the shot but was “absolutely sure” it did not come from next to him. Officer testified that he had never talked to the police until about two weeks before trial, even though the defendant was a good friend of his. He admitted he had been in communication with the defendant and Jessica, and he admitted that a woman who was pregnant with his child worked with Jessica.

The jury found the defendant guilty of second degree murder. The trial court found the defendant to be a Range III offender and imposed a maximum, sixty-year sentence. The court found that the defendant’s sentence should be enhanced beyond the presumptive sentence of fifty years based upon the defendant’s prior criminal history, history of serious juvenile delinquency, and use of a firearm in the commission of the offense. The court found no mitigating factors.

The defendant filed a motion for new trial thirty-one days after the judgment was imposed. The issue of the timeliness of the motion was never raised, and the court heard the motion on its merits and denied it. The defendant filed this appeal.

I

As a preliminary matter, we have considered sua sponte whether the defendant has waived appellate consideration of his issues by failing to file a timely motion for new trial. Although neither

party has commended the issue to us, this court has noticed upon review of the record that the motion for new trial was not timely filed.

“A motion for new trial shall be in writing or, if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered.” Tenn. R. Crim. P. 33(b). If the motion is not made, or if it is untimely, the trial court is without jurisdiction to consider its merits, and the appellate court is without jurisdiction to consider any issues which were required to be raised in the motion. See, e.g., State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997).

In the present case, the trial court’s sentencing order and judgment were entered on December 14, 2004. The defendant filed his motion for new trial on January 14, 2005. As calculated under Tennessee Rule of Criminal Procedure 45, this time period was thirty-one days, and January 13, 2005, the thirtieth day after December 14, 2004, was a Thursday -- not a Saturday, Sunday, or legal holiday. See Tenn. R. Crim. P. 45. While the rule does contain an exception for weather or other conditions which have rendered the clerk’s office inaccessible, see Tenn. R. Crim. P. 45(a)(2)(B), there is no indication in the record that such conditions existed and prohibited timely filing of the motion.

The defendant has raised three issues on appeal: (1) sufficiency of the evidence, (2) denial of his motion for mistrial, and (3) sentencing. Sufficiency of the evidence is not an issue which is waived by failure to file a timely motion for new trial. See State v. Davis, 748 S.W.2d 206, 207 (Tenn. Crim. App. 1987) (observing that issues which would result in dismissal of prosecution are not waived by failure to file a timely motion for new trial). Likewise, sentencing is not required to be raised in a motion for new trial in order to be reviewed on appeal. State v. Patterson, 966 S.W.2d 435, 440 (Tenn. Crim. App. 1997). However, denial of a motion for mistrial is an issue which must be raised in a motion for new trial in order to be reviewable on appeal. See Tenn. R. App. P. 3(e). We conclude that the defendant has waived the issue related to the trial court’s denial of a mistrial. We will consider the defendant’s sufficiency and sentencing challenges.

II

The defendant claims that the state’s evidence was insufficient because it was contradictory on several key points and does not support a finding of guilt beyond a reasonable doubt. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

The defendant was convicted of second degree murder, which consists of an unlawful, knowing killing. T.C.A. §§ 39-13-201, -210(a). In the light most favorable to the state, the evidence

demonstrates that Mickey Cannon and Natasha Sims testified that they saw the defendant shoot the victim. The defendant had previously exchanged words with the victim over the victim's relationship with the defendant's girlfriend.

Despite this evidence, the defendant claims that numerous inconsistencies in the evidence make it impossible for the state to surpass the beyond-reasonable-doubt threshold. He highlights conflicting testimony about (1) the lighting in the area where the eyewitnesses claimed to have seen the crime take place, (2) the location where the victim was standing when he was shot, (3) the distance between the defendant and the victim at the time of the shooting, (4) whether Mickey Cannon said, "Squad up," as the victim's group approached the defendant's group, (5) the identity of the individuals who beat O'Neal Wellington after the shooting, and (6) how the gun was fired and the relation of the way in which it was fired to the injury sustained by the victim. The defendant also claims that the jury failed to consider evidence that (1) O'Neal Wellington was beaten because individuals at the scene thought he was the shooter, (2) the murder weapon was never recovered despite a search, (3) the defendant went to the hospital to check on Wellington as proof he was not in hiding after the shooting, and (4) Puerto Rico was at the club on the night of the shooting and the investigating officer never pursued investigation of the men from Chattanooga.

We acknowledge that the evidence in this case was conflicting. The duty of the jury, as the trier of fact, was to resolve those inconsistencies by accrediting the evidence worthy of belief and discrediting the evidence that was less trustworthy. On appeal, the defendant has the burden of demonstrating that the evidence was insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). To that end, the appellate court resolves all conflicting testimony in favor of the jury's verdict and the trial court's judgment. Id. When we view the evidence in that light, we conclude that the state presented sufficient evidence from which the jury rationally concluded that the defendant committed a knowing killing and was guilty of second degree murder.

III

The defendant claims he was improperly sentenced because the trial court failed to observe the dictates of Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004), that any enhancement factors applied in arriving at the defendant's sentence be reflected in the jury verdict or admitted by the defendant. Our supreme court has held, however, that Tennessee's 1982 Sentencing Act did not violate the dictates of Blakely. See State v. Gomez, 163 S.W.2d 632, 661 (Tenn. 2005).

In consideration of the foregoing and the record as a whole, the judgment of the trial court is affirmed.

JOSEPH M. TIPTON, JUDGE